No. 90-58

JOSEPH F. SPANIOL
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL LYNN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether security procedures prescribed by the Chief Justice of the United States under the Classified Information Procedures Act violate separation of powers principles by restricting disclosure of classified information to court personnel who have received a security clearance from the Executive Branch.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 899 F.2d 564. The memorandum opinion of the district court (Pet. App. 13a-17a) is reported at 706 F. Supp. 593.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1990. The petition for a writ of certiorari was filed on July 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a United States Army officer formerly assigned to an intelligence support unit. On September 14, 1988, he was indicted by a federal grand jury in the Middle District of Tennessee on five counts charging him with interstate transportation of stolen goods, in violation of 18 U.S.C. 2314; concealment and storage of stolen goods, in violation of 18 U.S.C. 2315; interstate transportation of stolen firearms, in violation of 18 U.S.C. 922 and 924; possession of an unregistered silencer, in violation of 26 U.S.C. 5861(d); and possession of a silencer without a serial number, in violation of 26 U.S.C. 5861(i).

The offenses allegedly were committed between 1981 and 1983 while petitioner was a member of the Intelligence Support Activity, an Army Unit that performs classified missions. The indictment alleged that petitioner and others used Army documents and money to purchase firearms and goods that they kept for themselves while falsifying Army records to make it appear that other items (*e.g.*, ammunition and targets) had been purchased and consumed by the Army. During a consent search of petitioner's house, Army investigators found more than 200 firearms, having a total value of more than $60,000. See Gov't C.A. Br. 3.

1. Because portions of petitioner's statements to Army investigators, as well as certain relevant documents, contain classified information, the government submitted to the district court a proposed protective order safeguarding such information pursuant to Section 3 of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. at 706.[1] The aspect of

[1] Section 3 of CIPA provides: "Upon motion of the United States, the court shall issue an order to protect against the dis-

the proposed protective order at issue here concerns the procedures for obtaining security clearances for the district court's support staff.

Section 9(a) of CIPA provides that the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures under CIPA that will take effect 45 days after they are reported to Congress. 18 U.S.C. App. at 708. Pursuant to Section 9(a), Chief Justice Burger issued security procedures applicable to CIPA cases on February 12, 1981. Section 4 of those security procedures provides:

> *Personnel Security—Court Personnel.* No person appointed by the court or designated for service therein shall be given access to any classified information in the custody of the court, unless such person has received a security clearance as provided herein and unless access to such information is necessary for the performance of an official function. A security clearance for justices and judges is not required * * *.
>
> The court shall inform the court security officer or the attorney for the government of the names of court personnel who may require access to classified information. That person shall then notify the Department of Justice Security Officer, who shall promptly make arrangements to obtain any necessary security clearances and shall approve such clearances under standards of

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closure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States."

> the Executive Branch applicable to the level and category of classified information involved.
>
> * * * * *
>
> Justices, judges and cleared court personnel shall not disclose classified information to anyone who does not have a security clearance. * * *
>
> * * * * *
>
> Any problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action.

18 U.S.C. App. at 709. In accordance with these procedures, the government's proposed protective order required "such courtroom personnel as the [district] court requires for its assistance" to submit fingerprints and standard security forms to the court security officer to be forwarded to the Federal Bureau of Investigation.[2] Gov't C.A. Br. 4-5 & n.2. Initially, petitioner did not oppose entry of the proposed protective order, Indeed, petitioner and his counsel voluntarily signed pre-indictment nondisclosure agreements virtually identical to those contained in the proposed protective order. See Gov't C.A. Br. 5 & n.3.

2, On January 10, 1989, the district court unilaterally rejected the government's proposed protective order and entered in its place a protective order of its own. Pet. App. 18a-23a. The court's order re-

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[2] A "Court Security Officer" is provided for by Section 2 of the CIPA regulations, which describes that officer as a court-designated "individual with demonstrated competence in security matters, [who] shall, prior to designation, have been certified to the court in writing by the Department of Justice Security Officer as cleared for the level and category of classified information that will be involved." 18 U.S.C. App. at 708.

stricted disclosure of classified information to four designated members of the court's staff (a secretary, courtroom deputy, court reporter, and law clerk) and required each designated staff member to sign a court-drafted "Memorandum of Understanding" (*id.* at 24a) agreeing not to disclose classified information in an unauthorized manner. The court's order thus provided for the disclosure of classified information to court personnel without security clearances.

The district court subsequently denied the government's motion for reconsideration. In response to the government's contention that the court's protective order violated the CIPA security procedures by allowing disclosure of classified information to persons without security clearances, the court held that "[Section] 4 of the security procedures itself violates the Constitution by subjecting the judiciary to undue interference by the executive branch." Pet. App. 13a. The court concluded that requiring security clearances for court personnel handling classified information "interferes with the very core of the judicial process." *Id.* at 14a. The court said that "[t]he insidious evil envisioned by § 4 is its effect on the impartiality of the Court and the public perception and appearance of impartiality." *Id.* at 15a. "Allowing the Department of Justice *any* voice in selection of court personnel," the court said, would violate "elementary notions of fair play" and would "emasculate[] the presumption of innocence." *Ibid.* The district court expressed the belief that it had deferred to national security concerns "on its own terms, not on those dictated to it by the executive." *Id.* at 16a.

3. On interlocutory appeal pursuant to Section 7(a) of CIPA, the court of appeals reversed and remanded the case with instructions to "permit the Executive Branch to perform background checks as

described in section 4 of the Burger regulations." Pet. App. 12a. The court noted that, "[b]ecause [the district court] forbade the Department of Justice from engaging in the first step under the regulations, i.e., performing background checks, the only question ripe for review is whether the Executive Branch may constitutionally investigate the backgrounds of court personnel prior to their participation in a case involving classified information." *Id.* at 6a. "Only if the Justice Department actually performed a security check on [the district court's] personnel and denied one or more of them clearance," the court observed, "would the final authority issue require judicial resolution."[3] *Ibid.* The court held that security clearance investigations do not, on their face or as applied so far in this case, violate the constitutional separation of powers. *Id.* at 12a. The court concluded that the CIPA security regulations reasonably acommodate the need to avoid unwarranted intrusions upon the judicial function and the great deference owed to the executive branch on matters of national security. *Id.* at 9a-12a. The court noted that the security procedures under CIPA are analogous to those required of court personnel of the special Foreign Intelligence Court under the Foreign Intelligence Surveillance Act, 50 U.S.C. 1801-1811, and also to those of legislative personnel serving on congressional committees with national security oversight functions. Pet. App. 6a-9a.

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[3] The court noted, however, that the CIPA regulations require that "[a]ny problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action." Pet. App. 5a-6a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, petitioner lacks standing to assert the interests of the Judicial Branch, and those claims that petitioner might have standing to raise are not ripe for review. Accordingly, review by this Court is not warranted.

1. Article III of the Constitution, which confines the federal courts to adjudicating actual "cases" and "controversies," requires that a litigant must demonstrate some "personal injury fairly traceable to the [challenged] conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); see also *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952). The standing doctrine reflects not only constitutional limitations on the jurisdiction of federal courts, but also "embraces * * * judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights." 468 U.S. at 751.

The government's interlocutory appeal to the Sixth Circuit under Section 7(a) of CIPA presented an actual case and controversy. The district court's order would have resulted in a cognizable injury to governmental interests by releasing classified information to persons not cleared pursuant to the CIPA regulations. Petitioner, in contrast, cannot demonstrate that he will suffer any injury as a result of the decision of the court of appeals. That decision simply requires the district court's support staff to submit to the security clearance process before handling classified information. The court of appeals' mandate was not addressed to petitioner, and petitioner cannot

serve as the self-designated protector of what he perceives to be the interests of the Judicial Branch against alleged intrusion by the Executive Branch.

Petitioner asserts that requiring court personnel to submit to background checks conducted by the Executive Branch will threaten his "assurance of a fair trial before an impartial tribunal." Pet. 14. Petitioner also asserts "a vital personal interest in Article III, § 1's 'guarantee of an independent and impartial adjudication by the federal judiciary.'" Pet. 23 n.20 (quoting *CFTC* v. *Schor*, 478 U.S. 833, 848 (1986)). But petitioner does not assert that the decision of the court of appeals violates any of his constitutional rights. That is not surprising, because petitioner cannot demonstrate that the court of appeals' decision meaningfully impairs his right to a fair trial by an impartial tribunal. Instead, petitioner's claim to standing rests on a series of tenuous suppositions: first, that the required security clearances will destroy the impartiality of members of the court's staff; second, that staff members will be biased for rather than against the government as a result of the security clearance process; and third, that the biases of staff members will affect the court's conduct of the trial to such an extent that petitioner will be deprived of constitutional rights. This is precisely the kind of "abstract," "conjectural" and "hypothetical" claim of injury that this Court has held insufficient to support standing. See, *e.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974).

At best, petitioner's claims are premature. Petitioner himself concedes (Pet. 22-23) that his acquittal "would mean that the injury to judicial independence and the appearance of a fair trial will have been

harmless *to petitioner*." Thus, absent a final judgment of conviction, any claims petitioner may have based on alleged separation of powers violations are not ripe. See generally *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967).

2. On the merits, petitioner's constitutional claim is unpersuasive. This Court has recognized that "the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct." *Mistretta* v. *United States*, 109 S. Ct. 647, 659 (1989). The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). See also *The Federalist* No. 47, at 325-326 (J. Cooke ed. 1961) (separation of powers "d[oes] not mean that [the three departments] ought to have no *partial agency* in, or no *controul* over the acts of each other"). Just as a President is not absolutely insulated from a judicial subpoena in an ongoing judicial investigation, see *United States* v. *Nixon*, 418 U.S. 683, 706 (1974), so too the efforts of the Judicial Branch to prevent the unauthorized disclosure of classified information need not be absolutely insulated from Executive Branch resources and expertise. The fact that court support staff are subjected to FBI background checks does not "impermissibly threaten[] the institutional integrity of the Judicial Branch," *CFTC* v. *Schor*, 478 U.S. at 851. On the contrary, "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*" in light of the competing interests. *Id.* at 856.

As the court of appeals recognized (Pet. App. 9a-10a), there can be no dispute that the Executive Branch has a compelling interest in protecting clas-

sified information. See *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980); see also *Chicago & S. Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); *United States* v. *Curtiss-Wright Export Co.*, 299 U.S. 304, 320 (1936). It is likewise clear that the judiciary is the least suited of the three branches to the task of assessing the dangers that classified information may present to national security and foreign affairs. Cf. *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government."). As a practical matter, the Executive Branch has access to resources and expertise for assessing security risks that are simply unavailable to the judiciary. The Constitution does not require that the Judicial Branch seal itself off from these valuable resources. On the contrary, this Court has said that the security risks that arise when the government seeks a search warrant in cases involving national security "can be minimized by proper administrative measures, possibly to the point of allowing the Government itself [*i.e.*, the Executive Branch] to provide the necessary clerical assistance" to the court. *United States* v. *United States District Court*, 407 U.S. 297, 321 (1972). See also *United States* v. *Yunis*, 867 F.2d 617, 621 n.8 (D.C. Cir. 1989) ("Because members of the federal judiciary and their staffs are generally not familiar with security procedures, we think it wise that judges within this Circuit direct their respective court security officers to review orders, decisions, and memoranda before they are released.").

The CIPA security procedures issued by Chief Justice Burger reasonably accommodate the competing

concerns of judicial independence and protection of classified information that arise in security-sensitive criminal cases. The intrusion upon the court is minimal in light of the magnitude of the competing interests. The judge himself is not required to undergo any background check, see CIPA Security Procedures, Section 4, 18 U.S.C. App. at 709. In addition, the judge may decide to forgo background checks of his staff by using Executive Branch officials to assist with any clerical responsibilities, *ibid.*, or by handling the case file himself. See, *e.g.*, *Bowers* v. *United States Dep't of Justice*, 690 F. Supp. 1483, 1488-1489 (W.D.N.C. 1987).[4]

Thus, there is no merit to petitioner's claim that subjecting court staff to background checks by the Executive Branch as a precondition to handling classified information destroys the court's impartiality by rendering it dependent upon the Executive Branch. As this Court said in *Mistretta*, in the context of a constitutional challenge to a statute giving the President power to appoint federal judges to the United States Sentencing Commission:

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[4] Petitioner concedes (Pet. 21) that the decision of the court of appeals does not conflict with any decision of any other court of appeals. The only other court of appeals that has considered the issue agrees with the Sixth Circuit. See Pet. App. 11a (discussing *In re United States Dep't of Justice*, No. 87-1205 (4th Cir. Apr. 7, 1988)). Petitioner incorrectly cites Judge Gesell's comments from the bench during a pretrial hearing in *United States* v. *Poindexter*, No. 88-80 (D.D.C.), as an instance in which a district court refused to submit its support staff to security background checks. Judge Gesell's comments indicated that all staff members who received classified information had in fact applied for security clearances. The court therefore did not confront the issue whether its staff could participate in a CIPA case and handle classified information without obtaining security clearances.

> The mere fact that the President within his appointment portfolio has positions that may be attractive to federal judges does not, of itself, corrupt the integrity of the Judiciary. Were the impartiality of the Judicial Branch so easily subverted, our constitutional system of tripartite government would have failed long ago. We simply cannot imagine that federal judges will comport their actions to the wishes of the President for the purpose of receiving an appointment to the Sentencing Commission.

109 S. Ct. at 674. Similarly, it is difficult to imagine that the integrity of the judicial process will be destroyed by the security clearance process required under the CIPA regulations. The independence of the judiciary is not so easily subverted.

3. There is no merit to petitioner's argument (Pet. 17-20) that requiring court support staff to undergo background checks exceeds Congress's delegation of authority in CIPA to the Chief Justice and the Executive Branch. Section 9(a) of CIPA authorized the Chief Justice, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, to prescribe "rules establishing procedures for the protection against unauthorized disclosure of any classified information." 18 U.S.C. App. at 708. The requirement that court support personnel undergo background checks plainly establishes a procedure that protects against unauthorized disclosures. It is true that Section 9(a) of CIPA was "based on Section 103(c) of the Foreign Intelligence Surveillance Act" (FISA), 50 U.S.C. 1803(c). S. Rep. No. 823, 96th Cong., 2d Sess 11 (1980). But, as the court of appeals noted (Pet. App. 7a-8a), the procedures applicable under FISA are quite similar to the CIPA procedures. Petitioners incorrectly as-

sert (Pet. 18) that the FISA regulations "leave[] the 'determination' of what clearance is 'appropriate' always in the hands of the court." In fact, the FISA procedures expressly state that

> [p]ersonnel appointed by or designated for service to the court, shall undergo appropriate background investigation by the Federal Bureau of Investigation under the standards established by [CIA directive] as concurred in by the Attorney General. These personnel shall not have access to classified information unless they have received a security clearance deemed appropriate by the court in consultation with the Attorney General and the Director of Central Intelligence.

Security Procedures Established Pursuant to Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, by the Chief Justice of the United States for the Foreign Intelligence Surveillance Court, Section 4, *reprinted in* H.R. Rep. No. 558, 96th Cong., 1st Sess. 7-8 (1979). Finally, petitioner's contention that the requirement of background checks is more than the type of "housekeeping" measure contemplated by Congress is refuted by a House Report accompanying CIPA that expressly refers to procedures governing "how many court employees can have access to [classified] documents" and "the physical security of documents" as "housekeeping rules." H.R. Rep. No. 831, 96th Cong., 2d Sess. Pt. 2, at 8 (1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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